

# **WEBINAR WEDNESDAYS**



**Wednesday, July 8, 2020**

## **The Prosecutor and the Ethics of Plea Agreements**

Presented by:

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Distributed by:

**ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL**

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# The Prosecutor and the Ethics of Plea Agreements

Mark M. Neil

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To enhance your ability to ethically and effectively negotiate plea agreements that further the interests of justice

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Our objectives for this presentation are to:

- Identify the relevant Model Rules of Professional Conduct and other sources of guidance
- Identify and discuss issues in effectively and ethically negotiating plea agreements
- Address any questions or concerns you may have

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Your NAME, Your INTEGRITY

All want to see our name  
up in lights



**"YOUR NAME"**

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Your NAME, Your INTEGRITY

**Not want to see your name on  
a bar ethics complaint**

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 10-BG-938

IN RE   RESPONDENT.

A Member of the Bar of the  
District of Columbia Court of Appeals  
(Bar Registration No.  )

On Report and Recommendation of the  
Board on Professional Responsibility  
(BDN 131-02)

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## Why Worry About Professional Responsibility?

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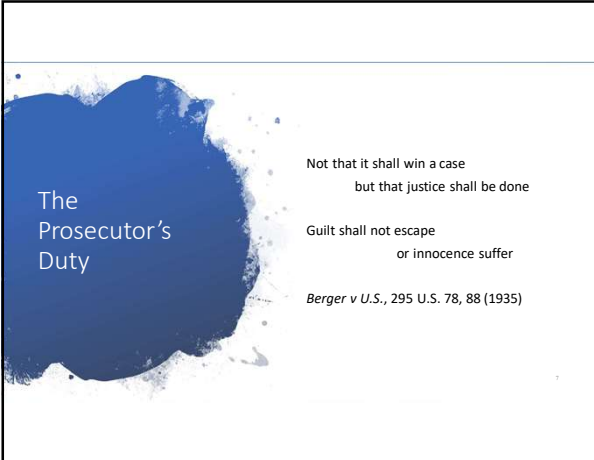
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The  
Prosecutor's  
Duty

Not that it shall win a case  
but that justice shall be done

Guilt shall not escape  
or innocence suffer

*Berger v U.S., 295 U.S. 78, 88 (1935)*

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The  
Prosecutor's  
Duty

This responsibility carries with it  
specific obligations to see that  
the defendant is accorded  
procedural justice and that guilt  
is decided upon the basis of  
sufficient evidence.

ABA Model Rules of Professional Conduct 2002  
*Comment [1] to Rule 3.8*

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The  
Prosecutor's  
Duty

"... the dignity and honor of the profession  
call for compliance with a higher  
standard of conduct, one of  
professionalism"

**NDAA - National Prosecution Standards  
Professionalism - Commentary**

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The Prosecutor's Duty

Do the Right Thing  
To the Right Person  
For the Right Reason

In the Right Way

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Critical Phase of Litigation

CAUTION

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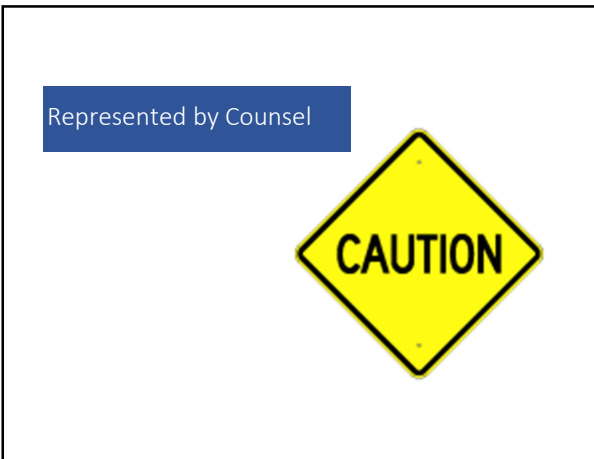
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Represented by Counsel

CAUTION

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Pro Se Defendant



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Why a Plea agreement?

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Establish Expectations

- Sets out what going / not going to do
- Avoid later challenges and questions

But, I thought the  
prosecutor was going to  
..... No one told me  
that.....

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## Inform and Confer

- The plea or sentencing hearing should not be the first place the victim [or their family] hears about a plea agreement

Hey, wait a minute!

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## National Prosecution Standard 26.2

....the prosecution should provide an orientation to the criminal justice system process...and should explain prosecutorial decisions.....

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## Protect the Conviction

- Avoiding reversal due to
  - Lack of understanding
  - Misunderstanding
  - Misrepresentation of circumstances

Defendant  
"expressed  
considerable  
confusion and  
frustration"  
during plea  
hearing

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## Protect the Defendant

- Pro se defendants
- Innocent defendants
- Less than competent counsel
- Unanticipated consequences

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## 3 Cases to Remember

Missouri v Frye

Lafler v Cooper

Padilla v Kentucky

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## Protect Yourself

- Keep in mind your ethical and constitutional responsibilities

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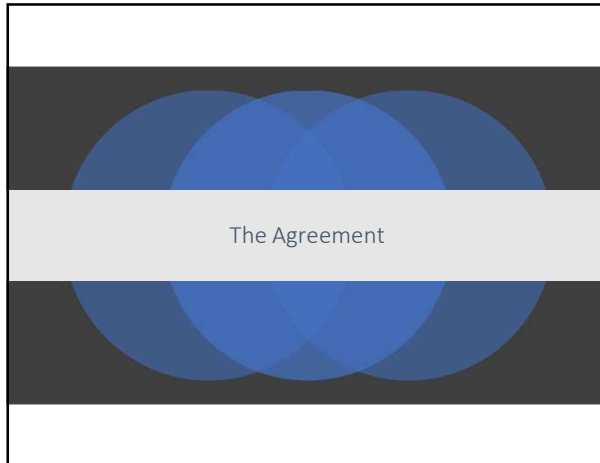
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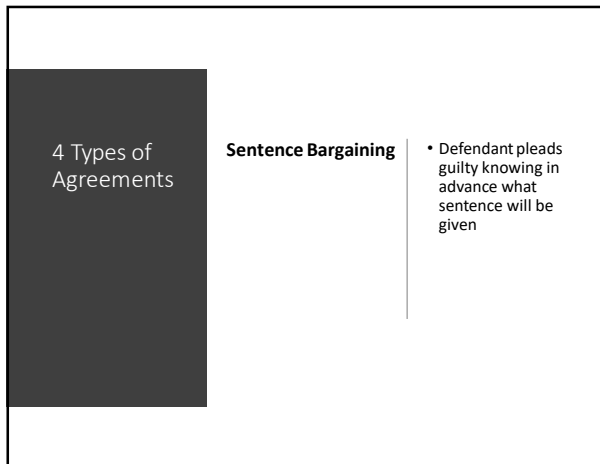
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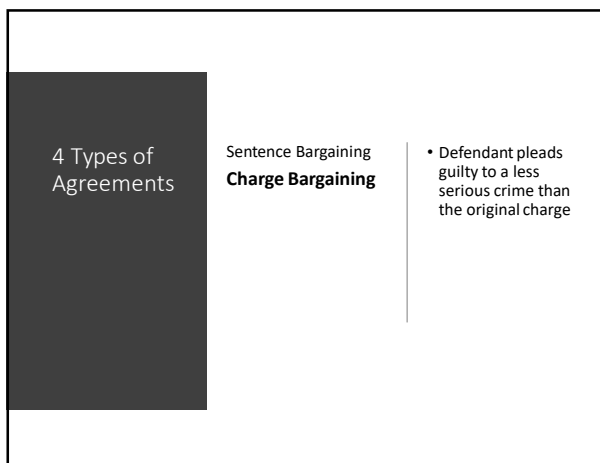
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## 4 Types of Agreements

Sentence Bargaining  
Charge Bargaining  
**Count Bargaining**

- Defendant pleads guilty to a subset of multiple original charges

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## 4 Types of Agreements

Sentence Bargaining  
Charge Bargaining  
Count Bargaining  
**Fact Bargaining**

- Defendant pleads guilty pursuant to an agreement in which prosecutor stipulates certain facts that will affect how defendant is punished

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## 4 Types of Agreements

Sentence Bargaining  
Charge Bargaining  
Count Bargaining  
Fact Bargaining

- May be combination of two or more of the types of agreements

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## Putting it in writing

State  
v  
Defendant

**PLEA AGREEMENT**

The State and Defendant agree as follows:

1. The Defendant is charged with multiple counts.....

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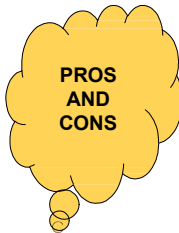
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Does it need to be  
in writing?

Every time?



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Think about who might  
use the agreement

- Prosecutor
- Defendant
- Defense Attorney
- Plea / Sentencing Court
- Victim

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Think about who might  
use the agreement

- Pre-sentence Investigation
- Probation Officers
- Treatment providers
- Corrections
- Parole Board
- Clemency officials

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Think about who might  
use the agreement

- Appellate Court
- Exhibit in Co-Def's trial
- Habeas proceeding
- Ethics panel
- Press

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### Contents of the Plea Agreement

Boilerplate

Case-specific

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## Boilerplate

Look to Rules

- Understands nature of charge
- Waive right to trial by jury
- Waive right confront witness
- Inform punishment
- Right to plead not guilty
- Voluntary
- Whether represented or not
- Ample time to consider
- Entirety of agreement
- Waiver of rights

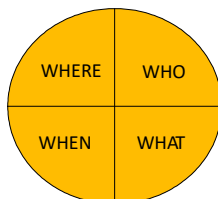
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## Case-specific

- Factual and Legal Issues
- Special Provisions
  - Sexual offender registry
  - Possible deportation
  - Other consequences beyond sentencing

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Logistics



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Logistics

**Who**

What

When

Where

- Signs
  - Prosecutor
  - Defendant
  - Defense Attorney
  - Any else???

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Logistics

Who

**What**

When

Where

- Required conditions
  - Evaluations
  - Testing
  - Registering
- Special conditions
  - DV programs
  - Substance abuse
  - Alternative sentencing

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Logistics

Who

What

**When**

Where

- Time
  - For plea
  - Other performance

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Logistics  
Who  
What  
When  
**Where**

- Court
  - Make sure they know where to be to enter the plea

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Prosecutor Shall Not

File or maintain charge not  
supported by probable  
cause

Rule 3.8(b)  
See also Rule 3.1



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Do Not Overcharge  
to Gain Leverage

Model Rules of Prof'l Conduct R. 3.8



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*Don't be*

**VINDICTIVE**



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Remember that the bargaining involves the:

- Crime committed
- The offender
- The victim
- The good of society in general

Don't make it about

- Your adversary
- You



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Prosecutor Shall Not

Improperly favor

Or

Invidiously discriminate

Rule 3.8(a)



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***"Global" resolutions***

Be careful when negotiating

- Forfeiture
- Restitution
- Civil penalties
- Waivers of civil rights

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***Play Fair***

and Carefully

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The prosecutor is an independent administrator of justice in the criminal justice system, which can only be accomplished through the representation and presentation of the truth.

The primary responsibility of a prosecutor is to seek justice. This responsibility includes, but is not limited to, ensuring that the guilty are held accountable, that the innocent are protected from unwarranted harm, and that the rights of all participants, particularly victims of crime, are respected.

*National Prosecution Standards  
1-1.1 Primary Responsibility*

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*Don't Pull a "Nifong"*



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*When in Doubt,  
Talk it Out*



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## Resources

- American Bar Association
- Model Rules of Professional Conduct
  - Criminal Justice Standards for the Prosecution Function
  - Criminal Justice Standards for Guilty Pleas
  - Annotated Model Rules of Professional Conduct

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## Sources of Professional Responsibility

- American Bar Association/Bureau of National Affairs, Inc.
  - Lawyer's Manual on Professional Conduct
- National District Attorneys Association
  - National Prosecution Standards
  - Ethical Issues in Prosecution

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Thank You

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